No. 91-849
No. 91-865

In the
Supreme Court of the United States

October Term, 1991

Board of Education of Community Consolidated School District 21,

Petitioners,

v.

Illinois State Board of Education and Sheldon and Pauline Brozer, on behalf of Adam Brozer,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO APPEAR AS AMICI CURIAE AND BRIEF AMICI CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION, NATIONAL ASSOCIATION OF STATE DIRECTORS OF SPECIAL EDUCATION, INC., COUNCIL FOR EXCEPTIONAL CHILDREN AND THE COUNCIL OF ADMINISTRATORS OF SPECIAL EDUCATION IN SUPPORT OF PETITION

GWENDOLYN H. GREGORY
Counsel of Record
Deputy General Counsel
National School Boards Association (NSBA)
1680 Duke Street
Alexandria, VA
(703)838-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Exec. Director

Nat'l Assoc. of State Dirs. of Spec. Educ.
1800 Diagonal Road
Alexandria, VA

Council for Except. Children
1920 Association Dr.
Reston, VA

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Board of Education of Community Consolidated School District No. 21, Cook County, Illinois,
Douglas C. Cannon and Sheldon and Pauline Brozer on behalf of Adam Brozer,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO APPEAR AS AMICI CURIAE IN SUPPORT OF PETITION

Counsel for Petitioners Board of Education of Community Consolidated School District 21 in Case No. 91-849 and counsel for Petitioner, Illinois State Board of Education in Case No. 91-865 have consented to filing of the within brief. Letters attesting to their consent will be filed with this Court upon their receipt. Counsel for Respondents Sheldon and Pauline Brozer, on behalf of Adam Brozer, has refused consent.

The National School Boards Association (NSBA), The National Association of State Directors of Special Education (NASDSE), the Council for Exceptional Children (CEC), and the Council of Administrators of Special Education (CASE) move this Court for leave to participate as amici curiae herein, for the purpose of filing the attached brief in support of the Petition for Certiorari.

Amicus curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards

associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Each of the 16,000 school districts which NSBA represents receives or is eligible to receive financial assistance under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. section 1401 et seq.. The subject of this case is of great importance to school districts across the country from both an educational and financial perspective.

Amicus curiae, NASDSE, is a nonprofit organization representing State education agency administrators responsible for directing, coordinating or supervising educational programs for children with

disabilities. Its members include State agency administrators in each of the 50 States, the District of Columbia, Puerto Rico, Bureau of Indian Affairs, and the territories. The NASDSE was established in 1938 and is the only major national educational organization representing State administrators of educational programs for children and youth with disabilities.

Each of the State educational agencies which NASDSE represents receives financial assistance under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Section 1401 et seq.. These agencies are responsible for disbursing funds provided under this Act for the education of children with disabilities in their States, for assuring compliance with the requirements of the Act in their States, and for establishing the policies and procedures necessary for the implementation of the requirements of this Act.

The subject of this case is of great importance to NASDSE members because of its implications for the education of children with disabilities. The IDEA has established principles and procedures that serve as the critical foundation for assuring that all children with disabilities receive a free appropriate public education, based on their individual needs. Consistent adherence to these principles and procedures by all involved parties is essential to ensure that children with disabilities receive a free appropriate public education and that their educational rights are protected.

Amicus curiae, the Council for Exceptional Children (CEC), is the largest professional organization in the United States of educators involved in and concerned with the education of children with disabilities and gifted and talented children and youth. Amicus curiae, the Council of Administrators of Special Education (CASE) is the division of

CEC which represents program supervisors, administrators, and personnel who prepare special education administrators. CEC and CASE strongly support the underlying principles and mechanisms of the Individuals with Disabilities Education ACT (IDEA), which have been well-tested for soundness and efficacy during the past sixteen years. The Council and its division have great concern with the subject of this case, which, through its impact on the principles and mechanisms of the IDEA, could potentially adversely affect the ability of state and local school districts to provide a free, appropriate, public education to children with disabilities.

The decision below, if allowed to stand, will affect the administration of the IDEA by states and school districts across the land and will affect the education of thousands of children with disabilities in those states and school districts. Thus, Amici urge this

Court to grant them leave to present their views.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

NSBA Deputy General Counsel
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

National Association of State Directors
of Special Education, Inc.
King Street Station I
1800 Diagonal Road, Suite 320
Alexandria, VA 22314
703/519-3800

Council for Exceptional Children
1920 Association Drive
Reston, VA 22091
703/260-3660

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AMICI CURIAE BRIEF IN SUPPORT OF PETITION

INTEREST OF THE AMICI

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Each of the State educational agencies which NASDSE represents receives financial assistance under the IDEA. These agencies are responsible for disbursing funds provided under this Act for the education of children

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Amicus curiae, the Council for Exceptional Children (CEC), is the largest professional organization in the U.S. of educators involved in and concerned with the education of children with disabilities and gifted and talented children and youth. Amicus curiae, the Council of Administrators of Special Education (CASE) is the division of CEC which represents program supervisors, administrators, and personnel who prepare special education administrators.

This case is of great importance to members of all four amici because of its implications for the education of children with disabilities. The IDEA has established principles and procedures that serve as the

critical foundation for assuring that all children with disabilities receive a free appropriate public education, based on their individual needs. Consistent adherence to these principles and procedures by all involved parties is essential to ensure that children with disabilities receive a free appropriate public education and that their educational rights are protected.

All amici strongly support the underlying principles and mechanisms of the IDEA, which have been well-tested for soundness and efficacy during the past sixteen years. Amici have great concern with the subject of this case, which, through its impact on the principles and mechanisms of the IDEA, could potentially adversely affect the ability of state and local school districts to provide a free, appropriate, public education to children with disabilities.

REASONS FOR GRANTING THE WRIT

The carefully crafted process established by Congress in the IDEA to ensure that every child with a disability receives a "free appropriate public education" cannot thrive in an adversarial atmosphere fostered by a standard which rewards parents, who are hostile and uncooperative to the point of a "siege mentality", by granting parents veto power over an admittedly "appropriate" public placement and awarding the parents' attorneys' fees as the prevailing party. The lower court's decision deferring to parental preference even while admitting that the school district followed the required procedures of the IDEA in good faith and offered an appropriate placement for the child [but for the parental hostility toward it] errs by fostering this statutory dysfunction.

ARGUMENT

I. The lower court's decision to allow parental "veto" over the "appropriate" placement recommendations of school districts, subverts the process Congress constructed to facilitate decisionmaking about appropriate educational placements and services.

The IDEA is a grant statute setting forth broad procedural mechanisms relating to the educational program to be provided children with disabilities. The purpose of the Act is to ensure that each child with a disability, as defined under the statute, receives a "free appropriate public education." The statute includes a number of affirmative requirements relating to the evaluation of the child, consultation with parents and educational experts, development of an individualized education program (IEP) and, finally, specific due process requirements.

Congress carefully crafted the administrative procedures under the IDEA to ensure that parents, the school district, teachers and other specialists work together

to design an "appropriate" educational program for the child, to determine the child's unique educational needs, an appropriate placement to meet those needs, and the "related services" supporting them.

To foster cooperation between parents and the school district, the statute grants certain rights and imposes certain obligations -- the right of parents to be present, to participate and to seek advice from experts in the development of the IEP, and the obligation of the school district to take into account the parents' educational experts and to obtain parental permission before making any change in the program of the child, to name but a few.

The requirement that the school district develop an IEP in partnership with the parents for each child with a disability is the "modus operandi of the Act". Burlington School Committee v. Dept. of Educ., 471 U.S. 359, 368 (1985). Under the IDEA an eligible child with

a disability has the right to be evaluated periodically by a group of experts to determine the child's individual educational needs and to set individual goals for that child. Parents have substantial input into the process through notice at every stage, the right to obtain an independent evaluation which the school district must review, and ultimately, the right to a hearing where there is a dispute. Congress intended the IEP process to be a continuing cooperative process between the experts in the school district and the parents of the child with a disability.

> [It is the method] of involving the parent and the handicapped child in the provision of appropriate services, providing parent counseling as to ways to bolster the educational process at home, and providing parents with a written statement of what the school intends to do for the handicapped child.
>
> It is not the Committee's intention that the written statement developed at the individual planning conferences be construed as creating a contractual relationship. Rather, the Committee intends to ensure adequate involvement of the parents

> or guardian of the handicapped child, and the child (when appropriate) in both the statement and its subsequent review and revision . . . By changing the language of this provision to emphasize the process of parent and child involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child.

S. Rep. No. 168, 94th Cong., 1st Sess. 11 (1975).

During debate on the Act the sponsors discussed the IEP conference at length. Senator Stafford, for example, stated:

> [A]n extremely important aspect is the requirement that each handicapped child will have individual planning conferences. The participants will include the parents, the teacher, and a qualified supervisor or provider of special education services. . . An additional benefit that will result from these conferences is one that is too often overlooked. Not only will the child be better served, and the parents better informed of the limitations their child has due to a particular handicap, but the teacher

> will learn from this experience as well.
>
> As we look more and more toward children with handicaps being educated with their "normal" peers, we must realize, and try to alleviate the burden put upon the teacher who must cope with that child and all the others in the class as well. The teacher needs reinforcement and a better understanding of the child's abilities and disabilities.
>
> It is hoped that the participation in these conferences will have a positive effect on the attitude of the teacher toward the child and an understanding of the child's problems in relating to his or her peers because of a handicapping condition.

121 Cong. Rec. S. 10961 (daily ed. June 18, 1975).

This Court has recognized that Congress intended the IEP process to be a cooperative dialogue between schools and parents:

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.

* * *

> We previously have cautioned that courts lack the 'specialized knowledge and experience' necessary to resolve 'persistent and difficult questions of educational policy.' [Citation omitted.] We think that Congress shared that view when it passed the Act. . .
>
> Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies . . . and in the formulation of the child's individual educational program. . .

Board of Educ. v. Rowley, 458 U.S. 176, 207-208 (1982).

II. The educational objectives of the IDEA are undermined by a ruling that gives parents the absolute right to dictate the educational program for their child.

Parents and school districts often have good faith disagreements as to the educational needs of a child with a disability. Where those differences cannot be reconciled the Act contemplates that the final decision be made by hearing examiners and courts, not by either

the school district or the parents. Parents naturally desire what they believe is best for their child but parents may be incorrect in their wishes for the child. For example, in this case it took two hearings before the parents finally agreed that their child's primary disability was a behavior disorder with a secondary condition of learning disability. Further, they want to remove the child from the jurisdiction of the school district which they believe has failed in its duty to educate the child. But all of the hearing examiners and courts that have heard this case have disagreed with the parents in this regard and found that the school district has at all times operated in good faith and proposed a program for the child that is educationally appropriate. Nonetheless, the parents obtained their desired placement through means never contemplated by the Act.

If decisions such as the one below are allowed to proliferate, as they undoubtedly

will in absence of intervention by this Court, school districts will find it difficult, or even impossible, to challenge parental demands even where they strongly believe that the child's educational interests are not served by the parents' proposed educational program.

The court below attempts to mitigate the precedential effect of its decision by arguing that this is an unusual situation. It is not. Parents sometimes have feelings of hostility about the district and feel that the school district does not have the best interests of the child in mind. Although that perception may not be well founded, it is understandable. Usually such parents will suppress their hostility and other negative emotions and will work with the district to develop an acceptable educational program for the child. The parents here have chosen to express their hostility in all of the forums in which first, the educational classification of their child was at issue and second, the educational

placement for their child was discussed. It is the expression of that hostility that has led the hearing officers and the courts to rule that the well was poisoned and parental preference must govern.

Under the precedent of the decision below parents will now be encouraged to express their hostility in order to achieve their goals. This is not just one unusual case in one circuit, as the court of appeals would have us believe. The community of parents of children with disabilities is active, vocal and well organized. These parents often have strong views about the education of their children which cause them to contest the school district's proposals. Their purpose is not to be obstructionists, and they operate in good faith, just as the school district does. Despite their strong feelings, parents usually act rationally in the hearing, relying on their experts to make their case, just as the school district does. However, in view of

the decision below, parents may now begin to express hostility in the due process hearings, rather than trying to work with the district. Counsel for the parents and other parental advocates may suggest that parents express their negative feelings, even hostilities, about the school district's proposed program for their child even perhaps to the extent of asking the child to oppose the district as well. This expression of hostility will be but a technique to achieve the goals they have for their child and a very effective technique it will be if the decision below is allowed to stand. The principle of the end justifying the means will be firmly in place.

Furthermore, parents using this approach will not even need to actually allege their "hostility" to the placement as the basis for their position that the school district's proposed IEP fails to benefit the child. Just as the courts and hearing examiners did below, examiners and courts may, sua sponte, take

the expression of parental hostility into account, relying on the precedent of the instant case to justify ordering the parents' preferred placement.

The decision below will result in unnecessarily high costs for school districts in the implementation of appropriate programs because it will be a tempting precedent for parents to use to get anything they want. Many parents, for their own reasons which may not be related to the educational needs of their child, want a private education for their child even where there is an "appropriate" public placement for the child in the school district. Either because they feel that there is some kind of "stigma" attached to the public setting (particularly in the case of children who are emotionally disturbed or behaviorally disordered) or for some other reason, they will not accept the public placement. These private settings can cost as much as $75,000 to $100,000 per year,

per student. See, e.g., Drew v. Clarke County School Dist., 877 F.2d 927 (11th Cir. 1989), (parents reimbursed for residential school in Tokyo); In Re Smith, 926 F.2d 1027 (1991) (court upheld, as not unreasonable, school district agreement to pay $200,000 a year for a residential placement).

These affirmative parental desires can easily be transmuted, with the guidance of counsel and the seal of approval of cases like the one at bar, into hostility to the public placement. The parents are doing what they believe is right for their child and cannot be faulted for taking extreme steps to meet that end. But the judicial process should not become a pawn of this process.

The court of appeals stated that "we do not share the school district's concern that under our ruling parents will be able to feign opposition to obtain their preferred placement." Parents do not need to "feign" opposition. The only reason they go to a

hearing is because they oppose the school district's recommendation. The issue is the level of opposition and the willingness of the parents to express that opposition. Even assuming the hearing examiner is able to determine whether the level of opposition is sufficient to jeopardize the effectiveness of the placement, it defies logic that such a determination is held to be relevant.

Congress did not intend to give parents a veto power over the educational program of school districts. It intended only to give parents the opportunity to be equal participants in the process with the right to convene due process hearings for the purpose of making an independent determination as to whether the school district's proposed program is educationally appropriate. But the elaborate procedural scheme of the IDEA and this Court's admonition in Board of Education v. Rowley to defer to the educational officials in the school district provided the

district has complied with the procedures and has developed an IEP that is "reasonably calculated to enable the child to receive educational benefits" are for naught if the precedent of this case is allowed to stand.

Under the lower court decision the school district's proposed educational program, though otherwise appropriate, is doomed from the start solely because of the negative attitude of the parents. The school is not even given the chance to attempt to work with the child to change his attitude about the school. The goal of the IDEA is, after all, to give children with disabilities the skills to go into society and live and work like their nondisabled counterparts. That is the mission of the school district and of the myriad of educational experts employed by the district -- to teach the child to live and work in his environment. He should not be taught that he can alter his environment at will merely by being hostile to it.

Further, we know of no research base to demonstrate that parental disapproval or even parental hostility to a proposed program necessarily precludes the successful implementation of that program to the ultimate benefit of the child. The parents in the instant case did not even raise the issue of their hostility to the placement precluding their child from benefitting from it. This novel "educational" concept was a creation solely of the hearing examiners and the courts below.

III. The decision below in effect "reverses" this Court's decision in Board of Education v. Rowley.

This Court held in its first decision under the IDEA (then the Education for All Handicapped Children Act) that courts should defer to the educational decisions of school districts as long as the district complied with the administrative procedures of the Act and developed an individualized educational program that was reasonably calculated to

enable the child to receive educational benefits.

Lower courts have also emphasized that parental preference is not the standard to be used in determining "appropriate" placement. In Schimmel v. Spillane, 630 F.Supp. 159 (E.D. Va. 1986), the district court determined that a private placement chosen by the parents was inappropriate because it did not meet the state's requirements for approval as a special educational school. The court noted that:

> Parents of handicapped students may not, because of personal desires, select a private institution of their choice and have the school system pay for the tuition. While the desires of the parents may be well motivated in that they seek the best for their child, the placement decision must be made by the school system in accordance with approved standards.

630 F.Supp. at 162. See, also, Smrcka v. Ambach, 555 F. Supp. 1227 (E.D.N.Y. 1983).

As this Court ruled in Rowley, there is no guarantee of a particular outcome. Even where a school district failed to demonstrate

that a student is receiving an educational benefit, this does not automatically mean they are providing an inappropriate program. In re Ronald M., Case No. 1985-26, 1985-86 EHLR DEC 507: 355, 356 (Ga. State Hearing Officer Dec., Aug. 20, 1985). In the instant case the school district has not even been given the opportunity to demonstrate that the student would benefit from the public placement.

> The education of the children of this state should be a partnership between the parent and the state, or school district. The education of all our children is an important goal for the success of our society. It is best achieved by cooperation between the student, his or her parent, the teachers, and the school administrators involved in the child's education. The appellant has been unwilling to cooperate with the school district and [the student's] teachers in order to resolve problems which could have been solved by cooperation. The failure to use the degree of professionalism exhibited by the school district can only interfere with and impede [the student's] education."

In re Michael T., Case No. 85-4, 1984-85 EHLR DEC. 506:333, 334 (Wash. ALJ Dec. April 3, 1985).

Undoubtedly, the school district in this case if allowed to implement its plan for public placement will take into account in working with the child, the adverse effects on the child of parental hostility toward the school and will develop educational methodologies to ameliorate such hostility. School districts also consider other negative influences on the child such as death or divorce in the family, parental abuse, socio-economic influences etc. Although these other negative influences are considered by the school district in developing an appropriate educational plan for the child, none of these factors -- and particularly not a temporary factor such as parental hostility -- should ever be the sole or definitive factor in determining placement. Parental hostility is outside the scope of the IDEA. It may be

relevant to the choice of methodology but it is not relevant to the determination of compliance with the "free appropriate public education" requirement of the IDEA.

The courts below have, in effect, turned the second prong of the Rowley test on its head. The parents' belief that the child cannot benefit from the placement proposed by the school district has become a self-fulfilling prophecy because, if the parents' expression of that belief is sufficiently impassioned, the court will hold that the child cannot benefit under the standard in Rowley. Surely, this Court did not intend such a result.

IV. Under the precedent below the school district must pay the parents' attorneys fees even though the school district was held to have followed the procedures of the IDEA, acted in good faith and proposed a "free appropriate public education" for the child.

Although all the hearing officers and both courts agreed that the school district's proposed placement was "appropriate," the

parents were awarded attorneys' fees as the "prevailing party." The district court agreed with both hearing officers that the school district's proposed placement was "appropriate" but also agreed that the officers were correct in taking into account the parents' "hostility" to the proposed public placement. Therefore, the court ruled that the parents "prevailed" and awarded attorneys' fees to the parents. In effect, good performance is rewarded with a fiscal penalty.

Making unreasonable demands entails no risk to parents; if the student's ultimate educational plan is that requested by the parents, their lawyers will charge the school district attorney's fees even if the school district has proposed an appropriate plan. But the educational process suffers through needless delays and animosity between parents and school personnel; Congress' carefully

drawn consensus-building arrangement is for naught.

The lower courts did not reach the question of whether the parents' proposed placement in this case is also "appropriate." But under the precedent in this case the parents would not necessarily have to propose an appropriate placement in order to prevail. The only standard is their "hostility" to the school district's proposed placement. This does a great disservice to the education of children with disabilities.

The court of appeals expressed its concern that placing the child in the school district's proposed setting would punish the child for the parents' intransigence. Amici disagree with that analysis because it assumes that the placement cannot benefit the child without first affording the school district an opportunity to educate the child in the public setting and to work with the child to overcome his feelings about the school. But even were

the court's concern justifiable, it is still impossible to understand why the court would reward the parents for their hostility by granting them attorneys' fees. How does it punish the child to make the parents pay their own fees? This is another example of how the lower court has turned the Act on its head. Parents are rewarded for defying the procedural scheme of the Act and for their hostility and refusal to attempt to work with the district. There is no way that the endorsement of this type of behavior can lead to an enhancement of the education of children with disabilities. This precedent can do nothing but seriously damage the prevailing attitude of cooperation between parents and schools which, under the law before this case, were required to work together.

V. Conclusion

Litigation involving children with disabilities is on the upswing, while other litigation against school districts is on the

decline. Listen: Could that be a lull in the school litigation explosion? Perry A. Zirkel, The Executive Educator, July, 1989. Amici are deeply concerned that the decision below will be a catalyst for new disputes. In addition, because of lower court decisions expanding the reach of the attorneys' fees provision of the IDEA, 20 U.S.C. section 1415(e)(4)(B) et. seq., to include the administrative level, school districts are not in the financial position to contest parental demands even where the district believes that the school district's proposed educational plan for the child is correct.

Amici urge this Court to review the decision at bar. Although this Court may be reluctant to review a case which is unique in its treatment of the law, the case is

nevertheless a devastating precedent for every school district in this country.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards Association (NSBA)
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

AUGUST W. STEINHILBER
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